BETTER MARKETS

August 6, 2020

Office of Exemption Determinations
Application No. D-12011
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Suite 400
Washington, D.C. 20210

Re: ZRIN 1210-ZA29 [Application No. D-12011] Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 40834 (July 7, 2020)

Dear Department of Labor:

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned notice of proposed rulemaking ("Proposed Rule" or "Release"), issued by the Department of Labor ("Department"). The Proposed Rule would create a class exemption from the prohibited transaction provisions in the Employee Retirement Income Security Act of 1974 ("ERISA") for investment advisers that meet certain conditions, more fully described below. In this letter, we also comment on a companion final rule ("Final Rule")[2] implementing the Fifth Circuit's 2018 decision vacating the Department's fiduciary duty rule issued in 2016.[3]

The Proposed Rule and the Final Rule are each plagued by major flaws, both substantive and procedural. They conflict with the language and intent of ERISA; they create huge loopholes in the fiduciary duty that Congress established to protect Americans' retirement assets;

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 Conflict of Interest Rule-Retirement Investment Advice: Notice of Court Vacatur, 85 Fed. Reg. 40,589 (July 7, 2020).

3 *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

they provide weak protections for any investment advice that ***is*** subject to ERISA; they rest on an essentially meaningless economic analysis; and they violate the substantive and procedural requirements applicable to federal agency rulemaking under the Administrative Procedure Act.

The Proposed Rule and the Final Rule will leave retirement savers far too exposed to the powerful conflicts of interest that for years have incentivized financial advisers to enrich themselves at the expense of their clients by recommending over-priced, under-performing, and often high-risk investments to retirement savers. That in turn will inflict enormous harm, continuing to cost those investors billions of dollars a year in lost retirement savings and undermining their efforts to fund a decent and dignified retirement. Essentially, the Proposed Rule and the Final Rule represent a massive wealth redistribution scheme, taking hard-earned savings out of the pockets of retirement savers and placing them in the coffers of financial advisers, without any credible justification grounded in ERISA or the broader public interest.

The Department should rescind the Final Rule, withdraw the Proposed Rule, and craft a strong new rule that establishes meaningful protections and remedies for retirement savers who must rely on financial advisers to help navigate the complex and vitally important choices they face in today's financial marketplace.[4]

BACKGROUND

In 1974, Congress enacted ERISA to ensure that Americans' critically important retirement assets were protected with the highest possible standards of loyalty and care imposed on those who manage or administer retirement plans or give investment advice about retirement plan assets. Congress articulated the important purposes of the law by observing that "the continued well-being and security of millions of employees and their dependents are directly affected by" retirement plans; that "adequate safeguards" were not in place to protect those

4 Better Markets has commented extensively on these issues in the Department's prior rulemaking, and we incorporate our prior comment letters as if fully set forth herein. *See, e.g.*, Better Markets Comment Letter on the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (Part 2) (Aug. 7, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-request-information-regarding-fiduciary-rule-and-0; Better Markets Comment Letter on the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (Jul. 21, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-request-information-regarding-fiduciary-rule-and; Better Markets Comment Letter on Definition of the Term "Fiduciary" - Proposed Delay on Applicability Date (Apr. 17, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-definition-term-fiduciary-proposed-delay-0; Better Markets Comment Letter on Definition of the Term "Fiduciary" - Proposed Delay on Applicability Date (Mar. 17, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-definition-term-fiduciary-proposed-delay-applicability; Better Markets Second Comment Letter on Best Interest Fiduciary Duty Rule (Sept. 24, 2015), https://bettermarkets.com/rulemaking/better-markets-second-comment-letter-dols-best-interest-fiduciary-duty-rule; Better Markets Comment Letter on Proposed Fiduciary Duty Rule (Jul. 21, 2015), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dols-proposed-fiduciary-duty-rule.

assets; and that it was therefore important to establish "standards of conduct, responsibility, and obligation for fiduciaries" of such plans.[5]

In 1975, just a year after ERISA was enacted, the Department hastily issued a rule implementing the statutory definition of an investment advice fiduciary under ERISA ("1975 Rule"). Unlike the straightforward language in ERISA, the 1975 Rule included a convoluted five-part test for determining when an adviser is a "fiduciary" subject to the high standards of care and loyalty in ERISA and the prohibitions on self-dealing and compensation in ERISA and the Internal Revenue Code. That five-part test provided that a person would be considered a fiduciary only if they:

(1) render advice as to the value of securities or other property or the advisability of investing in, purchasing, or selling securities or other property;
(2) on a regular basis;
(3) pursuant to a mutual agreement, arrangement, or understanding with the plan or IRA owner that the advice;
(4) will serve as a primary basis for investment decisions as to plan assets; and
(5) will be individualized based on the particular needs of the plan. [6]

This test significantly narrowed the statutory definition of an investment advice fiduciary and thus exempted a great deal of investment advice from the requirements established under ERISA governing fiduciaries. Whatever merit that test had in 1975, the market for retirement advice steadily outgrew it. There was a marked shift away from defined-benefit retirement plans, in which employers guaranteed employees a certain amount upon retirement and bore responsibility for managing plans assets, towards defined-contribution plans such as 401(k)s, in which employees were responsible for managing their own retirement assets.

Faced with navigating the increasingly complex investment marketplace on their own, retirement savers turned to financial advisers. At the same time, many of those advisers easily exploited the loopholes in the 1975 Rule, recommending investments that enriched the advisers at the expense of their clients. Moreover, sporadic or one-time advice about rolling large accumulations of plan assets into new types of accounts became increasingly frequent and important, highlighting the need for reforms that would close the regulatory loopholes in the 1975 Rule. Losses attributable to conflicts of interest among advisers continued to mount, reaching a staggering level, estimated conservatively at tens of billions of dollars per year.[7]

In 2010, the Department began the process of re-examining the dated 1975 Rule and crafting a new rule that would better reflect the reality of the market for investment advice and

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5 29 U.S.C. § 1001(a), (b).

6 *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 13 (D.D.C. 2016) (hereinafter "*NAFA*")..

7 *NAFA*, 217 F. Supp. 3d at 13.

establish better protections for retirement savers.[8] In 2016, Based on an extensive and thoroughly supported record, the Department concluded that to satisfy the explicit requirements and the underlying purposes of ERISA, it was necessary to substantially strengthen the regulatory protections for retirement savers against damaging conflicts of interest among advisers. That record included evidence that retirement savers were suffering enormous losses every year as a result of conflicts of interest motivating their advisers; that the massive loopholes in the definition of an investment advice fiduciary were largely responsible for those losses; and that the conditions for any exemption from the prohibited transactions relating to conflicted compensation or other self-dealing practices needed to be strengthened in keeping with the requirements in ERISA and the Internal Revenue Code.

Accordingly, the Department finalized a rule that closed the definitional loopholes by eliminating the regular basis and primary basis prongs and established a powerful set of exemptive conditions known as the Best Interest Contract exemption, requiring advisers to recommend investments "without regard to the financial or other interests of the adviser." The 2016 Rule also required advisers to retirement savers with an IRA to enter an enforceable contract setting forth the conditions for the exemption.[9]

As soon as the 2016 Rule was issued, broker-dealers and insurance agents launched a relentless attack against it in multiple federal courts.[10] That assault was spearheaded by Labor

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8 *NAFA*, 217 F. Supp. 3d at 13.

9 Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20,945 (Apr. 8, 2016), hereby incorporated by reference as if fully set forth herein.

10 Better Markets participated extensively in this series of cases as an amicus supporting the Department's position. *See* Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federal of America, National Employment Law Project & Public Investors Arbitration Bar Association in Support of Defendants-Appellees and Urging Affirmance, *Mkt. Synergry Grp. v. United States Dep't of Labor*, 885 F.3d 676 (10th Cir. 2018) (No. 17-3038), https://bettermarkets.com/sites/default/files/Markets_Synergy_Group_v._DOL_%2810th%20Cir%29-Amicus%20Brief-9-27-2017.pdf; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federal of America, National Employment Law Project & Public Investors Arbitration Bar Association Urging Affirmance of the District Court's Decision in its Entirety, *Nat'l Ass'n for Fixed Annuities v. Dept. of Labor* (D.C. Cir., filed Sept. 22, 2017) (No. 16-5345), https://bettermarkets.com/sites/default/files/NAFA_v.DOL_%28D.C.%20Cir%29-Amicus%20Brief-9-22-2017.pdf; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America & National Employment Law Project Urging Affirmance of the District Court's Decision in its Entirety, *Chamber of Commerce of United States of Am. v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018) (No. 17-10238), https://bettermarkets.com/sites/default/files/Chamber_of_Commerce_v.DOL_%2810th%20Cir.%29-Amicus_Brief%20-7-6-2017.pdf; Amicus Brief of Better Markets, Inc., Consumer Federation of America, & Americans for Financial Reform in Support of Defendants, *Market Synergy Group, Inc. v. Dept. of Labor* (D. Kan. 2016) (No. 16-4083).

Secretary Scalia, then in private practice, who was notorious for seeking to invalidate, often successfully, pro-consumer and pro-worker regulations.[11] The 2016 Rule fared well in these cases, with court after court rejecting the varied challenges to the rule, including the claim that it exceeded the Department's authority under ERISA's broad, remedial statutory framework.[12] However, in 2018, after forum-shopping his way into a favorable, pro-industry court, Secretary Scalia persuaded a divided panel of the Fifth Circuit Court of Appeals to vacate the 2016 Rule, over the strong dissent of the Chief Judge. The court held in part that the Department exceeded its authority under ERISA when it dispensed with the five-part test in the 2016 Rule.[13]

The Trump Administration happily acquiesced in the Fifth Circuit's ruling and abandoned any effort to seek reversal of the decision either through a petition for rehearing en banc or a petition for certiorari to the Supreme Court. The Department subsequently established an interim enforcement policy and announced its intention to revisit the regulatory requirements governing investment advice fiduciaries in light of the Fifth Circuit's decision. President Trump then nominated Mr. Scalia to serve as the Labor Secretary, and Mr. Scalia was able to secure an ethics opinion allowing him to participate in the new rulemaking. He rejected calls for his voluntary recusal.[14] The Final Rule and the Proposed Rule were released in July.

SUMMARY OF RULES

Final Rule

The Final Rule implements the Fifth Circuit's outlier 2018 decision by officially reinstating the 1975 Rule, including its five-part test. The Department issued the rule without providing notice or opportunity to comment, based on the claim that the rule was simply a ministerial implementation of the Fifth Circuit's vacatur of the 2016 Rule. Nowhere in the Final

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https://bettermarkets.com/sites/default/files/Amicus%20Brief%20filed%20by%20Better%20Markets%20et%20al.%20in%20Market%20Synergy%20v.%20DOL%20%207-29-16.pdf; Amicus Brief of Better Markets, Inc., Consumer Federation of America, & Americans for Financial Reform in Support of Defendants, *Nat'l. Ass'n for Fixed Annuities v. Dept. of Labor*, (D.D.C. 2016) (No. 16-1035), https://bettermarkets.com/sites/default/files/NAFA%20v.%20DOL%20-%20Amicus%20Brief%207-15-16%20Final%20for%20Filing_0.pdf.

11 Better Markets, Special Report: Eugene Scalia has been Wall Street's Best Friend and a One-man Financial Stability Wrecking Crew (Sept. 16, 2019), https://bettermarkets.com/sites/default/files/Better_Markets-Eugene_Scalia_Report_Sept-2019_0.pdf

12 *Id.*

13 *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018) (hereinafter "*Chamber*").

14 Press Release, Better Markets, DOL Secretary Scalia Should Recuse Himself From Participating in the Fiduciary Duty Rulemaking Process After Fighting for Years to Kill It (Oct. 29, 2019), https://bettermarkets.com/newsroom/dol-secretary-scalia-should-recuse-himself-participating-fiduciary-duty-rulemaking-process.

Rule release did the Department analyze its extremely consequential and discretionary decision to adhere to the Fifth Circuit's interpretation of the scope of the fiduciary duty under ERISA and to accept that court's analysis, which was discredited by every other federal court to consider the issue.

Proposed Rule

The Proposed Rule will establish a new class exemption from the prohibited transaction provisions in ERISA and the Internal Revenue Code governing fiduciaries who provide investment advice to employee benefit plans and IRAs. Specifically, the rule would establish conditions under which fiduciaries could lawfully accept certain forms of compensation and engage in certain principal transactions with plans and IRAs that would otherwise be prohibited.

The principal conditions include:

- Compliance with the "Impartial Conduct Standards," which require advisers—
  - to act in the "best interest" of their clients, as interpreted by the SEC under its own recently finalized "Regulation Best Interest;"
  - to accept compensation that does not exceed reasonable compensation;
  - to seek the best execution of the transaction reasonably available under the circumstances;
  - to ensure that statements about the transaction and related matters are not "materially misleading;"
- Disclosure to investors, prior to the transaction, of—
  - an acknowledgment that the firm and the adviser are fiduciaries, with respect to any fiduciary investment advice rendered to the client;
  - a description of the services to be provided and the adviser's material conflicts of interest, which is accurate and not misleading in all material respects;
- Establishing, maintaining, and enforcing policies and procedures that are—
  - reasonably designed to ensure compliance with the Impartial Conduct Standards;
  - when viewed as a whole, prudently designed to avoid misalignment of the interests of the adviser and the client;
- Annual, retrospective review designed to detect and prevent violations of the Impartial Conduct Standards, certified by the firm's chief executive officer.

The Proposed Rule will also establish eligibility criteria or disqualifications from reliance on the exemption in the event of certain criminal misconduct or a systematic pattern or practice of violating the conditions of the exemption. Finally, the Proposed Rule will establish a six-year record retention requirement.[15]

[15] Release at 40,862-65.

COMMENTS

The Final Rule and the Proposed Rule suffer from innumerable deficiencies, as detailed below. From a policy standpoint, they will do little to protect retirement savers from the adviser conflicts of interest that continue to siphon away tens of billions of dollars a year from Americans' retirement accounts, hard-earned money that those contemplating and already in retirement can ill afford to lose.

Legally, they run afoul of the basic tenets of administrative law and the Administrative Procedure Act. It is axiomatic that when engaged in rulemaking, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[16] Conversely, the agency may not rely on factors "which Congress has not intended it to consider."[17] And agency actions that are based too heavily on speculation rather than evidence are likely to be deemed arbitrary and capricious.[18] In addition, the law provides that when an agency departs from a prior position, it must "display awareness that it ***is*** changing position" and "must show that there are good reasons for the new policy."[19] Moreover, when a "new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[20]

The analysis set forth below demonstrates that the Final Rule and the Proposed Rule are both contrary to law and arbitrary and capricious under these legal principles. The Department has violated them in numerous ways:

- It has failed to examine and take into account all of the relevant data, including the enormous evidence of harm that conflicts of interest inflict on retirement savers;

- It has relied far too heavily on factors such as the interests of the adviser industry and far too little on factors such as the needs of retirement savers;

- It has failed to offer rational explanations for the choices it has made, including its decision to issue the Final Rule without any analysis of its discretionary determination to follow the Fifth Circuit's reasoning and reinstate the 1975 Rule;

- It has acted contrary to the explicit requirements of ERISA by establishing new exemptions for prohibited transactions without making the requisite findings;

- It has failed to adequately assess the economic impact of the Proposed Rule; and

16 *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2866 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
17 *See State Farm*, 103 S. Ct. at 2867.
18 *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).
19 *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original).
20 *F.C.C. v. Fox*, 556 U.S. at 515.

- It has failed to provide the compelling and detailed justification that the law requires in light of the Department's decision to change its approach to the protection of retirement savers, as evidenced by its dramatic departure from the very strong protections and conditions that it saw fit to establish in the 2016 Rule.

For all of these reasons, and those set forth below, the Department should rescind the 1975 Rule, abandon the Proposed, and develop a new rule that provides meaningful protections for retirement savers in accordance with the language and intent of ERISA.

I. THE FIVE-PART TEST IN THE 1975 RULE CONFLICTS WITH ERISA AND HARMS RETIREMENT SAVERS, AND THE DEPARTMENT SHOULD HAVE PROPOSED ITS RESCISSION RATHER THAN SUMMARILY REINSTATING IT.

The Final Rule revives the old, widely discredited five-part test created out of whole cloth in the 1975 Rule for identifying investment advice fiduciaries. Yet that outdated rule conflicts with the plain language and intent underlying ERISA, and it inflicts significant harm on retirement savers by exempting huge swaths of investment advice from the fiduciary duties set forth in the law. The Department was not duty-bound to restore that test under the Fifth Circuit's decision or any other authority. To the contrary, it could and should have rescinded it.

A. The Five-Part test conflicts with the plain language and purposes of ERISA and causes widespread harm.

Two of the loopholes in the five-part test have proven to be especially damaging to the interests of retirement savers. First, it provides that to fall under ERISA, investment advice must be rendered on a regular basis, thus carving out isolated or one-time advice, no matter how much money is at stake or how consequential the advice may be to the client's retirement planning. Second, it provides that advice must be rendered pursuant to a mutual agreement or understanding that the advice will serve as a primary basis for the client's investment decision, a purely technical requirement that has no evident rationale. Clearly, neither of these elements of the five-part test find support in ERISA's text, which defines a fiduciary, in relevant part, simply and broadly as a person who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so."[21] Moreover, these narrow tests clearly conflict with the Congressional purposes underlying ERISA: to expand, not constrict, protections for retirement savers and their retirement assets.[22]

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21 29 U.S.C. 1002(21)(A).

22 *See* 120 Cong. Rec. 3977, 3983 (1974) (Rep. Perkins) ("The Committee has adopted the view that the definition of fiduciary is of necessity broad. . . . This is a departure from current judicial precedents but is necessary to the proper protection of these plans.").

Over the years, advisers have frequently avoided their fiduciary responsibilities under ERISA by invoking these definitional loopholes, often relying on fine-print clauses they have incorporated into their customer agreements stipulating that any advice rendered to the client is neither "on a regular basis" nor "pursuant to" the applicable understanding. During the rulemaking that culminated in the 2016 Rule, the Department carefully reviewed these defects in the old five-part test. As explained in the 2016 Rule release, the 1975 Rule "significantly narrowed the breadth of the statutory definition of fiduciary investment advice by creating a five-part test that must, in each instance, be satisfied before a person can be treated as a fiduciary adviser."[23]

It further explained that "today, as a result of the five-part test, many investment professionals, consultants, and advisers have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments."[24] Such advisers may operate with conflicts of interest they need not disclose; they may give imprudent and disloyal advice; and they may steer plans and IRA owners to investments based on their own, rather than their customers', financial interests.[25] In short, the five-part test frequently permits "evasion of fiduciary status and responsibility in ways that undermine the statutory text and purpose."[26]

That release also cited instances in which advice on major investment decisions involving huge sums of money could easily fall outside ERISA's regulatory framework simply because they involved one-time advice. The examples included whether to purchase a group annuity of lasting consequence to a company's employees or whether to roll assets over from a plan to an IRA, a uniquely important crossroad in retirement planning.[27] It also highlighted instances where advisors could defeat fiduciary status by claiming that the advice was not rendered pursuant to a mutual agreement or understanding that the advice would serve as a primary basis for the client's investment decisions.[28]

In the Release accompanying the Proposed Rule, the Department clearly recognizes the dangers that these loopholes pose. For example, the Department acknowledges the potentially enormous importance of advice rendered on an isolated, one-time basis: "Amounts accrued in an ERISA-covered Plan can represent a lifetime of savings, and often comprise the largest sum of money a worker has at retirement. Therefore, the decision to roll over ERISA-covered Plan assets to an IRA is potentially a very consequential financial decision for a Retirement

[23] 2016 Rule at 20,946.
[24] 2016 Rule at 20,946.
[25] 2016 Rule at 20,946.
[26] 2016 Rule at 20,955.
[27] 2016 Rule at 20,955.
[28] 2016 Rule at 20,955.

Investor."[29] The Department further acknowledges that advisers have powerful incentives to recommend that retirement savers roll over their assets into one of their own institution's IRAs, to reap "significant revenue" from such transactions. Those revenues were expected to approach $2.4 trillion cumulatively from 2016 through 2020.[30]

In response to these concerns, the Department makes the irrational decision to stand by the five-part test. The Department at least repudiates its 2005 guidance flatly exempting rollover advice from the investment advice definition, and it further seeks to mitigate the potential for harm by adding a requirement that advisers document their reasons why the advice to roll over was in the retirement savers best interest.[31] Yet, it decided to reinstate the 1975 Rule. The Department therefore cautions—indeed insists—that even for rollover transactions, "[a]ll prongs of the five-part test must be satisfied for the investment advice provider to be a fiduciary within the meaning of the regulatory definition," including the regular basis prong and the primary basis prong.[32] Nowhere in the Final Rule or in the Proposed Rule does the Department proffer a rationale for the continued application of the regular basis and primary basis elements in the 1975 Rule, nor does it evaluate the most obvious, effective, and simplest alternative, which is to jettison the old definition dating back to 1975, along with its five-part test, and implement a definition that more closely tracks the broad one that Congress enacted in ERISA.

B. The Fifth Circuit's decision in *Chamber of Commerce* does not prevent the Department from rescinding the 1975 Rule.

The *Chamber* decision does not tie the Department's hands and preclude it from revising the 1975 Rule. Nor, apparently, has the Department advanced that argument. In the Final Rule, which was summarily adopted without notice and comment, the Department merely explains that it is implementing, as a ministerial matter, the Fifth Circuit's vacatur of the 2016 Rule defining who is a fiduciary under ERISA. The Department nowhere claims that it was required to do so or that the *Chamber* decision actually prevented the Department from altering the five-part test.

Nor could the Department contend that it lacks the authority to deviate from the Fifth Circuit's decision. In the first instance, the Fifth Circuit's reading of ERISA simply is not the final, nationwide word on the appropriate interpretation of ERISA. Furthermore, the Fifth Circuit's opinion does not deserve to be regarded as the controlling interpretation of who qualifies as an investment advice fiduciary under ERISA. The Court held in relevant part that (1) in ERISA, Congress adhered to the common law conception of a fiduciary and thus *required* a relationship of trust and confidence as a condition of fiduciary status, and (2) that the

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[29] Release at 40,836; *see also id.* at 40,845 (the decision to roll over assets "may be one of the most important financial decisions that Retirement Investors make, as it may have a long-term impact on their retirement security.").

[30] Release at 40,839.

[31] Release at 40,839.

[32] Release at 40,389.

Department therefore violated the statute when it sought to expand that definition beyond those common law contours in a new rule that dispensed with the five-part test.[33]

But the Fifth Circuit's analysis was incorrect, as Chief Judge Stewart made clear in his dissent. To arrive at its holdings, the panel had to ignore the plain language of ERISA; misread numerous Supreme Court precedents; and resort to wholly irrelevant extra-statutory sources, such as the provisions in the ***securities laws*** governing the distinctions between brokers and investment advisers.[34] Specifically, as explained by Chief Judge Stewart citing Supreme Court precedent, in ERISA, Congress actually intended to expand upon the common law concept of a fiduciary because "the common law of trust did not offer completely satisfactory protections" for retirement savers.[35]

Moreover, numerous other courts have explicitly and implicitly rejected the core finding of the Fifth Circuit that the ERISA fiduciary duty is rigidly limited to common law notions of trust and confidence and therefore necessarily incorporates the elements of the five-part test, including the regular basis prong. Two federal courts have expressly found that the 2016 Rule, which removed the offending elements of the five-part test, more closely adheres to ERISA than does the old rule. Specifically, in *Nat'l Ass'n for Fixed Annuities v. Perez*, the federal district court in D.C. firmly rejected the claim that the 2016 Rule exceeded the DOL's authority under ERISA when it removed the five-part test and replaced it with a more expansive interpretation as to when a person becomes an investment advice fiduciary. The court explained that the 2016 Rule was actually more in line with ERISA than the old rule:

> ***Indeed, if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text.*** Nothing in the [statutory] phrase 'renders investment advice' suggests that the statute applies only to advice provided on a regular basis.[36]

As the court noted, controlling Supreme Court authority provides that "ERISA does not define 'fiduciary' 'in terms of formal trusteeship, but in functional terms of control and authority over the plan, ... thus expanding the universe of persons subject to fiduciary duties . . . . '"[37]

The federal district court in Texas was equally emphatic in ruling that the 2016 Rule "better comports with the text, history, and purposes of ERISA." Specifically, in a thorough and well-reasoned decision on all counts, the court rejected the plaintiffs' claim that ERISA requires regular contact between an investor and an adviser to trigger the fiduciary duty:

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33 *Chamber*, 885 F.3d at 368-79.

34 *Chamber*, 885 F.3d at 388-395 (Stewart, J. dissenting).

35 *Chamber*, 885 F.3d at 391 (Stewart, J. dissenting) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 496, (1996)).

36 *NAFA*, 217 F. Supp. 3d at 23.

37 *NAFA*, 217 F. Supp. 3d at 25 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)).

> Plaintiffs argue the DOL's interpretation of what it means to render investment advice is entitled to no deference, because ERISA requires regular contact between an investor and a financial professional to trigger a fiduciary duty. ***If anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.*** The broad and disjunctive language of ERISA's three prong fiduciary definition suggests that significant one-time transactions, such as rollovers, would be subject to a fiduciary duty. Under the five-part test, however, such a transaction would not trigger a fiduciary duty. This outcome is seemingly at odds with the statute's text and broad remedial purpose . . . . An interpretation covering such transactions better comports with the text, history, and purposes of ERISA.[38]

The upshot is that the Fifth Circuit's decision is an outlier among courts that have addressed the Department's authority to broaden the definition of an investment advice "fiduciary" under ERISA. It is not legally sound, nor does it require the Department to reinstate the 1975 Rule.

In sum, the five-part test conflicts with the law and poses a serious and abiding threat to retirement savers. Moreover, contrary to the Fifth Circuit's decision, that test is not enshrined in ERISA and it does not prevent the Department from rescinding or amending the definition of an investment advice fiduciary. Under these circumstances, rather than reinstating the five-part test with little explanation, ignoring the evidence of harm resulting from that policy, and side-stepping the better-reasoned decisions from other courts, the Department had an obligation to

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38 *Chamber of Commerce of United States of Am. v. Hugler*, 231 F. Supp. 152, 173 (N.D. Tex. 2017) (emphasis added), *rev'd, Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018); *see also id.* at 173 (explaining that the Department has decided that its new interpretation "is more suitable given the text and purpose of ERISA"); *id.* at 173 ("An interpretation covering such [one-time] transactions better comports with the text, history, and purposes of ERISA"). Even the Fifth Circuit (albeit a panel different from the panel that heard the case on the merits) could be said to have implicitly rejected the notion that the Department exceeded its authority by promulgating the 2016 rule, as it summarily dismissed emergency motions for injunctive relief pending appeal of the decision of the Texas district court. Thus at least one panel of the Fifth Circuit apparently implicitly found that the plaintiffs had not demonstrated a likelihood of success on the merits of that claim and others. *Chamber of Commerce v. U.S. Dep't of Labor,* No. 17-10238 (5th Cir. Apr. 5, 2017). Similarly, the D.C. Circuit summarily rejected attempts by the industry plaintiff in the *NAFA* case to win an injunction pending appeal of the D.C. district court's decision flatly rejecting the interpretation of ERISA embraced by the Fifth Circuit. *See* Order Denying Injunction Pending Appeal, *Nat'l Ass'n for Fixed Annuities v. United States Dept. of Labor*, No. 16-5345 (2016), *available at* https://assets.documentcloud.org/documents/3239244/Nafa-Ruling-20161215.pdf*; see also Mkt. Synergy Grp., Inc. v. United States Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kan. Nov. 28, 2016) (rejecting all challenges to the 2016 Rule), *aff'd, Mkt. Synergy Grp., Inc. v. United States Dep't of Labor,* 885 F. 3d 676 (8th Cir. 2018).

align the regulatory definition of an investment advice fiduciary with the statutory definition, to close those gaping loopholes, and to better protect retirement savers from conflicts of interest. It was contrary to law and arbitrary and capricious for the Department to do otherwise.

II. THE PROPOSED EXEMPTION WILL NOT ADEQUATELY PROTECT RETIREMENT SAVERS FROM ADVISER CONFLICTS OF INTEREST.

Unfortunately, the Department has decided not only to fully restore the obsolete and harmful 1975 Rule, but also to create a new and expansive exemption that will do little to protect retirement savers from the conflicts of interest among advisers that have plagued them for decades. The Proposed Rule suffers from many defects, as detailed below, but its cardinal failing is that its core provision—the "Best Interest" standard—is modeled on the SEC's recently adopted and mislabeled "Regulation Best Interest." As Better Markets and others have demonstrated, that rule centers on an ill-defined standard of loyalty that barely improves upon the lax suitability requirement that brokers have enjoyed for decades. It comes nowhere near the fiduciary duty that Congress envisioned and prescribed in ERISA.[39] Moreover, none of the various conditions included in the Proposed Rule, individually or taken together, are capable of adequately protecting retirement savers from adviser conflicts of interest.

A. The Best Interest Standard

At the heart of the Proposed Rule is the so-called "Best Interest" standard. On its face, this requirement falls well short of the fiduciary duty set forth in ERISA, as it does not require advisers to act, as the law provides, "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries."[40] Rather, it explicitly establishes what amounts to a weak "tie goes to the adviser" model, under which advisers may place their own best interest on a par with their clients'. In reality, advisers will be able to put their interests ahead of their clients' best interest. The Proposed Rule provides in relevant part that advisers must not—

> place the financial or other interests of the Investment Professional, Financial Institution or any affiliate, related entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.[41]

39 Brief Amicus Curiae of Better Markets, Inc. and the Consumer Federation of America in Support of Petitioners, *XY Planning Network v. SEC* (filed Jan. 3, 2020) (No. 19-2886), https://bettermarkets.com/sites/default/files/Reg_BI_-_Amicus_Brief_Final_As_Filed_%281-3-20%29.pdf

40 29 U.S.C. § 1104.

41 Release at 40,864.

Worse, the Release makes clear that this requirement is to be interpreted and applied in accordance with the standard set forth in the SEC's Regulation Best Interest."[42] The SEC's regulation in turn amounts to little more than the notoriously lax "suitability" standard that has governed broker-dealers and their financial advisers for decades without affording meaningful protections against adviser conflicts of interest.

The Release sets forth a long list of practices that the Proposed Rule will ***not*** limit or prohibit:

- It will not prohibit advisers from receiving all manner of compensation as a result of their advice, i.e. "a wide variety of payments that would otherwise violate the prohibited transaction rules, including, but not limited to, commissions, 12b-1 fees, trailing commissions, sales loads, mark-ups and mark-downs, and revenue sharing payments from investment providers or third parties";[43]

- It will not prohibit advisers from recommending proprietary products or products from limited menus of investment options;[44]

- It will not require advisers to recommend the best available option for clients, or even what the adviser reasonably believes is the best available option;[45]

- It will not establish any duty to engage in ongoing monitoring of recommended investments;[46] and

- It will not prohibit an adviser from engaging in principal transactions involving the sale of a variety of debt securities, including municipal bonds.[47]

As explained below, none of the other requirements in the Proposed Rule adequately compensate for the weak "best interest" standard or establish conditions that can effectively protect investors from the adviser conflicts of interest that will continue to siphon off their retirement savings.

B. <u>Reasonable Compensation</u>

The Proposed Rule provides that the compensation received by advisers for their services may not exceed "reasonable compensation."[48] However, the Releases takes great pains to dilute

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[42] Release at 40,842.
[43] Release at 40,836.
[44] Release at 40,847.
[45] Release at 40,843.
[46] Release at 40,843.
[47] Release at 40,840-41.
[48] Release at 40,863.

this provision. For example, it cautions that when assessing reasonableness, "one generally needs to consider the value of ***all*** the services and benefits provided for the charge, not just some."[49] Moreover, it emphasizes that the yardstick for reasonableness is the "market value" of the services delivered to the client, thus incorporating the standards that have evolved in a marketplace for years rife with conflicts of interest and the routine recommendation of investment products at inflated prices. To cap it off, the Release further explains that the reasonableness of fees will depend on "the particular facts and circumstances at the time of the recommendation."[50] This fact-specific test is a virtual invitation to evasion and abuse, as advisers will readily contrive reasons why the compensation is eminently reasonable given the circumstances and "all the services and benefits" provided.

C. Disclosures

The Proposed Rule will also require advisers to make certain written disclosures to clients relating to the adviser's fiduciary status, the services to be provided, and the material conflicts of interest arising out of those services. However, this requirement will do little to protect investors from conflicts of interest. First, disclosures are inherently unreliable and ineffective at protecting investors, as they are typically difficult to understand, belittled or explained away by advisers, and provided just prior to transactions and without affording the client any meaningful opportunity to absorb the disclosures or explore their implications with the adviser. That is especially true here, as the Release makes clear that advisers will have broad discretion or "flexibility" in determining how to draft and time their disclosures. Disclosures need not be tailored to each client, and they must only be imparted any time "prior to engaging in any transactions" with clients, rendering them of little effect.[51]

The disclosure requirement will actually prove to be especially confusing and indeed misleading in at least one respect, as it requires advisers to "acknowledge" that they are fiduciaries under ERISA and the Code.[52] But as explained above, the Proposed Rule will not in fact impose a fiduciary standard on advisers, as it allows them to engage in prohibited transactions provided they comply with what amounts to the suitability test under the securities laws and FINRA rules. In short, contrary to the mandatory disclosure, advisers will not have "fiduciary status" under the Proposed Rule, thus misleading retirement savers.

Finally, the Release further marginalizes the impact of the disclosure requirement by explaining that the Department does not intend the fiduciary acknowledgment or any of the disclosure obligations to create any private right of action.[53] Thus, advisers are unlikely to face any consequences even if their disclosures are inaccurate in material respects.

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[49] Release at 40,843 (emphasis added).
[50] Release at 40,843.
[51] Release at 40,844.
[52] Release at 40,844.
[53] Release at 40,844.

D. Policies and Procedures

The Proposed Rule will require financial institutions to establish, maintain, and enforce written policies and procedures "prudently designed" to ensure that the firm and its advisers comply with the Impartial Conduct Standards.[54] This is essentially a paperwork exercise that firms will happily implement and then "check the box." Actually adhering to such policies and procedures is another matter, and as explained below, the enforcement mechanisms in the Proposed Rule provide weak incentives. Furthermore, under the Proposed Rule, the policies and procedures need only be designed to "mitigate" conflicts of interest, never "eliminate" them. And the mitigation requirement is couched in vague and malleable terms, requiring that the policies and procedures, "when viewed as a whole," are prudently designed "to avoid misalignment" between the interests of the adviser and the client.

E. Rollovers

The Proposed Rule reflects a commendable recognition of the potentially huge importance of rollovers to retirement savers, and the especially powerful conflicts of interest they can engender among advisers.[55] It accordingly will require advisers to document the basis for rollover recommendations. However, as explained above, the value of this approach is largely undone by the Department's repeated reminders that rollovers will fall entirely outside the purview of the Proposed Rule unless they satisfy the five-part test. And as baby boomers continue to enter retirement in droves, they will often be seeking one-time advice about the wisdom of rolling their 401(k) nest eggs into IRAs, creating a boon for advisers who will continue to evade the requirements in the Proposed Rule altogether under the now-resuscitated five-part test.

F. Retrospective Review

The Proposed Rule will require advisers to conduct an annual retrospective review designed to assist a firm in detecting and preventing violations of the Impartial Conduct Standards and the firm's policies and procedures, certified by the firm's chief executive officer. Here again, this is a formality that appears to have significant value, but its actual utility is likely to be marginal. Firms would be required to retain the report and the supporting data for six years and make it promptly available to the Department or another regulator upon request. Thus, the impact of this requirement hinges principally upon the initiative of regulators in seeking out and reviewing the resulting reports. Moreover, the Release does not specify what, if any, consequences would necessarily follow should reports reveal violations of the standards or the policies and procedures short of criminal violations or egregious patterns of misconduct.

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[54] Release at 40,845.
[55] Release at 40,845.

G. Eligibility and Enforcement

The Proposed Rule includes what are exceedingly weak eligibility criteria, providing that firms and individual advisers could become ineligible to rely on the exemption, but only if they are the subject of certain criminal convictions under Section 411 of ERISA, or if they engage in a systematic pattern or practice of violating the conditions or related misconduct. This standard will do little to punish or deter violations of the rule.[56] First, it will not be triggered at all absent the most egregious types of violations—criminal violations or systemic patterns of repeated violations. Furthermore, the Proposed Rule is full of lenient provisos and procedures. For example, firms will be allowed to petition the Department for a determination that notwithstanding their egregious unlawful conduct, the firm's continued reliance on the exemption would not be contrary to the purpose of the exemption. The Department will have sole discretion to make that determination, and it will be based on a long list of factors, including "extenuating circumstances."[57] Furthermore, with respect to systemic violations of the exemption, firms and individual advisers alike will be afforded a six-month opportunity to cure, and failing cure, an opportunity to be heard before the Department.[58]

The Release also makes a point of emphasizing that the Proposed Rule will create no new enforcement remedies for retirement savers: The Proposed Rule "would not expand Retirement Savers' ability, such as through required contracts and warranty provisions, to enforce their rights in court or create any new legal claims above and beyond those expressly authorized in ERISA."[59] It will thus do nothing to give IRA owners in particular any private means of redress for violations of the rule. Removing any doubt about the Department's intentions, the Release explains that "the proposed exemption relies in large measure on Financial Institutions' reasonable oversight of Investment Professionals and their adoption of a culture of compliance."[60] This approach is profoundly misguided and ineffective, as evidenced by the decades of abuse that many advisers have inflicted upon unsuspecting retirement savers by recommending investments that enrich advisers handsomely but serve investors poorly. Thus, the Department has proposed a rule creating weak protections that conflict with the letter and intent of ERISA and that cannot be meaningfully enforced.

III. THE DEPARTMENT'S ECONOMIC ANALYSIS IS DEFICIENT.

The Proposed Rule is not only weak on its face but also unsupported by a meaningful economic analysis. The Department has failed utterly to assess whether and to what extent the Proposed Rule will actually protect retirement savers from adviser conflicts of interest.

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[56] Release at 40,848-49.
[57] Release at 40,848.
[58] Release at 40,849.
[59] Release at 40,851.
[60] Release at 40,851.

The "Regulatory Impact Analysis" set forth in the Release is focused almost entirely on the benefits of the Proposed Rule to the adviser industry, with nothing but a conclusory nod to the interests of Retirement Investors.[61] What is conspicuously absent from the Release is any analysis of the well-documented and enormous harm that adviser conflicts of interest inflict on millions of retirement savers each year, coupled with an assessment of how and to what extent the Proposed Rule will mitigate those harms.

With respect to the industry, the Release highlights the multiple benefits it will afford, explaining that it will give firms more flexibility to choose between the proposed exemptions and existing exemptions, depending on their "needs and business models;" that it will provide certainty to advisers; and that it will minimize costs insofar as the Proposed Rule is aligned with other regulatory requirements adopted by other regulators. The Release in effect highlights the benefits of a standard that is divorced from the applicable law—in this case, ERISA—and deliberately designed to mimic the mediocre requirements adopted elsewhere, including at the SEC.[62] In addition, the Release goes on for pages detailing, and in many cases quantifying, the costs of compliance with the Proposed Rule, including the number of affected entities and the costs associated with the requirements relating to written policies and procedures, the annual retrospective review, the rollover documentation, and the recordkeeping.[63] It concludes that the benefits of the rule will outweigh those compliance costs.[64]

With respect to the benefits for retirement savers, the Release devotes scant attention. It confesses that "it has not quantified the benefits due to a lack of available evidence."[65] Elsewhere the Release notes that "the Department believes that the proposed exemption would provide significant protections," yet it includes no analysis, beyond the observation that the rule will "help preserve wide availability of investment advice arrangements and products for Retirement Investors."[66] However, this purported "benefit" is unsubstantiated in the Release and in any case of dubious value: The "wide availability of investment advice arrangements and products" cannot be considered a "benefit" for investors if the arrangements and products are conflict-ridden and bound to drain away a significant portion of the savings on which they must depend in retirement. And the Department further undercuts its meager assessment of the benefits by hastening to add, as noted above, that the Proposed Rule will provide no new meaningful private enforcement mechanisms.

The absence from the Release of any substantive analysis of the expected efficacy of the Proposed Rule is especially striking, and indefensible, since the Department itself acknowledges the immense importance of impartial investment advice for retirement savers. The Release

61 Release at 40,850.
62 Release at 40,850-51.
63 Release at 40,851-56.
64 Release at 40,851.
65 Release at 40,851.
66 Release at 40,850.

observes that the share of participant directed defined contribution plans has continued to grow over the years, with the vast majority of savers responsible for investing their retirement savings. It further observes that retirement savers "are in need of high quality, impartial advice from financial service professionals in making these investment decisions."[67] Yet remarkably it goes no further, offering no assessment of the degree to which the Proposed Rule will actually rein in adviser conflicts of interest and increase investor access to high quality, unbiased advice.

The Proposed Rule is, of course, not being put forth in a vacuum. The Department's 2016 Rule was the result of a lengthy process in which it compiled exhaustive evidence of the harm that conflicted advice inflicts on retirement savers.[68] The Council of Economic Advisers, for example, found that conflicted investment advice:

- Results in savers earning 1 percentage point less in returns per year;
- If a retiree receives conflicted advice at retirement to roll over their 401(k) balance to an IRA, they will lose an estimated 12 percent of the value of their retirement savings over the course of 30 years;
- Ultimately, conflicted advice costs retirement savers at least $17 billion per year, a conservative estimate that captures the damage only in relation to one type of retirement account (IRAs) and one type of investment (mutual funds).[69]

Similarly, the Department's own Regulatory Impact Analysis released in conjunction with the 2016 Rule, found that "an ERISA plan investor who rolls her retirement savings into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser."[70] Ultimately, as the

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67 Release at 40,850.

68 The rulemaking record that led to the adoption of the 2016 Rule is hereby incorporated by reference, as if fully set forth herein, including, but not limited to, the following: Dept. of Labor, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions (Apr. 2016), https://www.dol. gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf; Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21,927 (Apr. 20, 2015); Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings 2-3 (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf; Definition of the Term Fiduciary, 75 Fed. Reg. 65,263 (Oct. 22, 2010). A comprehensive list of documents relating to the fiduciary rule can also be found at: https://www.dolfiduciaryrule.com/Resources.

69 Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings 2-3 (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

70 Dept. of Labor, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and

Department previously found, "the balance of research and evidence indicates that the aggregate harm from cases in which consumers receive bad advice based on conflicts of interest is large."[71] Put simply, the evidence that conflicts of interest does immense harm to investors is overwhelming, yet the Department, in the Proposed Rule, has failed to grapple with this evidence or to assess the ability of the Proposed Rule to mitigate those harms.

These omissions from the economic analysis are indefensible under the law. The Department has abdicated its responsibility to evaluate the economic impact of its Proposed Rule, in this instance the impact on retirement savers who are hemorrhaging billions of dollars a year to advisers driven by conflicts of interest. This failure is especially striking—and unacceptable under basic principles of administrative law—given the massive rulemaking record underlying the Department's 2016 Rule, which exhaustively detailed the scale of harm that adviser conflicts of interest inflict on retirement savers and the ways in which each element of that rule would address those conflicts and ameliorate investor losses.

IV. THE PROPOSED RULE IS CONTRARY TO LAW BECAUSE THE DEPARTMENT CANNOT MAKE THE REQUISITE FINDING THAT THE PROPOSED CLASS EXEMPTION IS IN THE INTERESTS OF PLAN PARTICIPANTS AND PROTECTIVE OF THEIR RIGHTS.

ERISA explicitly provides that the Department may not grant exemptions from the prohibited transactions absent findings that the exemptions are "in the interests of the plan and of its participants and beneficiaries," and "protective of the rights of participants and beneficiaries of such plan."[72] Those findings cannot be made on this record for two reasons.

First, as demonstrated in Section II above, the Proposed Rule cannot reasonably be expected to deliver meaningful protections against adviser conflicts of interest. It adopts as its core provision the weak "best interest" standard promulgated by the SEC for brokers who dispense advice about securities. At best, it creates a strangely formulated parity of interest between advisers and their clients. In reality, it will allow advisers to continue recommending investment products—not limited to securities—that enrich advisers at the expense of the retirement savers. And the other requirements in the exemption are largely window dressing that do not adequately fortify that feeble core standard.

Second, as demonstrated in Section III above, the Proposed Rule has no grounding or justification in an economic analysis. Because the Department has failed to undertake any

Exemptions 4 (Apr. 2016), https://www.dol. gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

71 Dept. of Labor, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions 5 (Apr. 2016), https://www.dol. gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

72 29 U.S.C. § 1108(a)(2).

meaningful assessment of the extent to which the Proposed Rule will actually rein in adviser conflicts of interest and reduce the prodigious losses that retirement savers are currently suffering every year from those conflicts, it cannot possibly find that the Proposed Rule will serve the interests of plan participants and beneficiaries or protect their rights. And because those findings are mandatory under ERISA, the Proposed Rule is contrary to law.

V. THE FINAL RULE AND THE PROPOSED RULE ARE BOTH PROCEDURALLY FLAWED.

A. The DOL impermissibly refused to afford notice and comment on the Final Rule, in violation of the APA.

The Department seeks to justify its decision to issue the Final Rule summarily and without any notice and comment by invoking the good cause exception to the notice-and-comment requirement in the APA.[73] However, as a general matter, this exception is "narrowly construed and only reluctantly countenanced."[74] It is intended for situations where "compliance would interfere with the agency's ability to carry out its mission."[75] It is "usually invoked in emergencies, and an agency must 'overcome a high bar' to do so."[76]

Here, the Department makes no effort to justify the good cause exemption based on an emergency. Rather, it claims that the good cause exception applies because the "rule merely conforms the text in the Code of Federal Regulations to reflect the mandate of the Fifth Circuit's decision, which vacated the Department's 2016 Rule."[77] It further claims that notice and comment "would be unnecessary because the Department is simply conducting the ministerial task of implementing the mandate issued by the Fifth Circuit."[78]

This, however, is pure sleight of hand. It does not come close to an accurate description of the complex state of play surrounding the status of the old 1975 Rule following the Fifth Circuit's decision, nor does it surmount the "high bar" that applies to the good cause exception. While the Final Rule itself implements the Fifth Circuit's decision, the Department was not legally ***required*** to do so. Rather, as the basis for the Final Rule, the Department had to make a critically important, discretionary policy decision to accept the Fifth Circuit's errant ruling and restore the restrictive five-part test. The Department's decision was further complicated by the fact that the Fifth Circuit's decision was an outlier, contradicted expressly or implicitly in decisions and rulings issued by numerous other federal courts.[79] And as shown above, this was a

73 5 U.S.C. § 553(b)(B)
74 *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984).
75 *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992).
76 *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).
77 Release at 40,590.
78 Release at 40,590.
79 *See, e.g., Nat'l Ass'n for Fixed Annuities v. Perez,* 217 F. Supp. 3d 1 (D.D.C. 2016)

matter of enormous consequence, as the revival of the five-part test restores massive loopholes in the protections Congress designed for the benefit of retirement savers.

Quite clearly, the public and all interested stakeholders deserved an opportunity to address the weighty legal and policy issues surrounding the Department's misguided decision. Such a substantive decision cannot be made without following the APA's notice-and-comment requirements.

B. The comment period on the Proposed Rule has been unacceptably short.

The Department afforded only a 30-day comment period on the Proposed Rule, and it refused to grant any of the requests for extensions that came from a number of groups, including a coalition of public interest organizations (Better Markets among them). This was an unreasonably short amount of time in which to provide comments on such a complex and important proposal, one that will affect virtually all Americans struggling to save for retirement. This would be an unreasonably short comment period for such a significant rulemaking under any circumstances, but that is particularly the case given the many challenges that stem from the COVID-19 pandemic.

The truncated comment period conflicts with the APA, which seeks to encourage public participation in the rulemaking process. Under the APA, agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the proposed rule's content.[80] This includes giving "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments…."[81] Courts have emphasized that the APA's notice and comment requirements "serve important purposes of agency accountability and reasoned decision making" and "impose a significant duty on the agency" to allow for meaningful and informed comment."[82]

Given the unreasonably compressed time in which to comment on the Proposed Rule, many organizations and members of the broader public likely to be affected by the rule will not have had a meaningful opportunity to comment. Even organizations that manage to submit comments under these unduly rushed circumstances will be denied the opportunity to do so fully, including the opportunity to conduct research and submit written data to properly inform the process.

The legislative history of the APA also undercuts the Department's short comment period. It suggests that "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."[83] Clearly, the retirement security of American workers and retirees is a matter of great importance. The fact that this rulemaking has been deemed a "significant regulatory action" underscores the substantial impact that it will have on

[80] *See Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009).
[81] 5 U.S.C. § 553(c).
[82] *Am. Medical Ass'n v. Reno*, 57 F.3d 1129, 1132-133 (D.C. Cir. 1995).
[83] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 259 (1946).

retirement savers.

The Department's unduly short comment period also conflicts with executive orders governing the rulemaking process at Executive Branch agencies. For example, Executive Order 12866 directs federal agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of ***not less than 60 days***."[84] Likewise, Executive Order 13563 affirms that comment periods for proposed agency rules "should generally be ***at least 60 days***."[85] This proposal affords only half that minimum comment period, without providing a persuasive justification. In fact, as explained above and below, in light of the significance and complexity of the Proposed Rule, as well as the unprecedented circumstances in which we are living, commenters will require ***more*** than the minimum number of days directed by executive orders in order to meaningfully and comprehensively comment on the proposal.

Thirty days is an insufficient amount of time to fully digest and dissect the many complex and technical issues that this rulemaking raises. These include, for example, whether the Final Rule was an appropriate exercise of the Department's discretion; how the reinstatement of the 1975 five-part test for determining who is an investment advice fiduciary will impact retirement savers and providers of retirement investment advice; whether and to what extent the Proposed Rule will afford meaningful protections to retirement savers; the reliance of the Department on the SEC's deeply compromised Regulation Best Interest in fashioning the Proposed Rule; the credibility of the economic analysis offered by the Department in support of the Proposed Rule; and the strength, *vel non*, of the Department's supposed finding under ERISA that the Proposed Rule will serve the interests of retirement savers and protect their rights.

The Department has been considering how to properly regulate retirement investment advice markets for well over a decade. It has struggled to find an approach that balances retirement savers' need for advice with adequate protections to ensure that advice is not tainted by conflicts of interest. Given this history, the Department's rushed approach to this rulemaking was unfair, inappropriate, contrary to the law. This action suggests that the Department is not interested in fully considering important aspects of the problems at issue, is not keeping an open mind, and has predetermined the outcome of this rulemaking.

C. Secretary Scalia improperly refused to recuse himself from both rules.

While in private practice, Secretary Scalia led the successful attack on the 2016 Rule in the federal district court in Texas and ultimately the Fifth Circuit, all in keeping with his long career devoted to dismantling regulations adopted to serve the public interest.[86] After he was

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[84] Executive Order 12866, Regulatory Planning and Review, § 6(a) (Sept. 30, 1993) (emphasis added).

[85] Executive Order 13563, Improving Regulation and Regulatory Review, § 2(b) (Jan. 18, 2011) (emphasis added).

[86] *See* Better Markets, Trump's Nominee to be Secretary of the Department of Labor Has Been Wall Street's Best Friend and a One-Man Financial Stability Wrecking Ball (Sept. 2019),

confirmed as Labor Secretary, and because of his role in destroying the 2016 Rule to the detriment of countless retirement savers, he should have recused himself from any involvement in the Department's effort to craft a new rule under ERISA. That process should have been guided by a staunch commitment to the public interest and to the protection of retirement savers, not an ideology that de-values regulation and exalts the interests of the financial services industry.[87]

The conflict of interest and the appearance of impropriety involved here could not be clearer: In private practice, Secretary Scalia sought, on behalf of his industry clients, to dismantle the 2016 Rule; now, as Secretary he is in effect continuing to serve those same clients by leading the development of a rule that will cater to their "best interests," not the public interest. Nevertheless, in October 2019, Secretary Scalia apparently received clearance to participate in the current rulemaking, notwithstanding his clear conflict of interest.

While the ethics opinion clearing Secretary Scalia's participation in this rulemaking has apparently not been made publicly available, media reports about that decision indicate that it was badly flawed and represents an inappropriate and hyper-technical reading of the applicable ethics requirements. According to those reports, Trump Administration ethics officials cleared Secretary Scalia because in the litigation attacking the 2016 Rule, he represented industry ***groups***, such as the Chamber of Commerce and NAFA, rather than "specific parties."[88] This argument would seem to border on the frivolous—the Chamber of Commerce, NAFA, and the other groups that Secretary Scalia represented during the assault on the 2016 Rule are simply associations of many specific members of the insurance and brokerage industries most affected by the rules governing conflicts of interest among advisers under ERISA.[89]

Equally disturbing, in clearing Secretary Scalia to participate in this rulemaking, Trump Administration ethics officials explicitly disclaimed any obligation to comply with the "spirit" of the ethics rules.[90] This irresponsible notion has no place in government ethics. In addition to avoiding actual conflicts of interest, as delineated by specific ethics rules, avoiding the

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https://bettermarkets.com/sites/default/files/documents/Better_Markets-Eugene_Scalia_Report_Sept-2019.pdf.

87 Andrew Ackerman, Labor Nominee Would Likely Sit Out Financial-Advice Rule Making, WALL ST. J. (Aug, 9, 2019), https://www.wsj.com/articles/labor-nominee-would-likely-sit-out-financial-advice-rule-making-11565343120.

88 Ian Kullgren & Rebecca Rainey, Trump Labor Agencies Ease Up on Recusals, POLITICO (Jan. 15, 2020)

89 Eric Morath, *Labor Secretary Scalia to Participate in Financial-Advice Rulemaking*, WALL ST. J. (Oct. 29, 2019), https://www.wsj.com/articles/labor-secretary-scalia-to-participate-in-financial-advice-rulemaking-11572380389..

90 Ian Kullgren & Rebecca Rainey, *Trump Labor Agencies Ease Up on Recusals*, POLITICO (Jan. 15, 2020) ("another DOL official said: 'We don't have to look at the spirit. What we really looked at was the [Office of Government Ethics] guidance.'").

appearance of impropriety is a key aspect of government ethics requirements.[91] This episode appears to be part of a pattern in the labor agencies under the Trump Administration, in which officials systematically ignore ethics rules, an approach that the chief ethics lawyer under President George W. Bush characterized as "a great big middle finger to the Office of Government Ethics."[92] That blatant disregard for ethics rules, which has no place in a system in which public officials are supposed to adhere to the rule of law and serve the public interest, is apparent here.

<u>CONCLUSION</u>

We hope these comments are helpful as you evaluate the Proposed Rule and re-evaluate the Final Rule.

Sincerely,

Dennis M. Kelleher
President & CEO

Stephen W. Hall
Legal Director and Securities Specialist

Jason R. Grimes
Senior Counsel

Better Markets, Inc.
Suite 1080
1825 K Street, N.W.
Washington, D.C. 20006
(202) 618-6464

dkelleher@bettermarkets.com

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91 *See* United States Office of Government Ethics, *A Refresher on the Impartiality Rule* (Jan. 25, 2017) ("Underlying these rules is a principle that employees must avoid even the appearance of impropriety."); 5 C.F.R. § 2635.501(a) ("This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality.").

92 Ian Kullgren & Rebecca Rainey, *Trump Labor Agencies Ease Up on Recusals*, POLITICO (Jan. 15, 2020).

shall@bettermarkets.com
jgrimes@bettermarkets.com

www.bettermarkets.com